PRINCIPAL AND AGENT—FRAUDULENT REPRESENTATIONS OF AGENT—EFFECT OF PROVISIONS OF CONTRACT.—COLONIAL DEVELOPMENT CORPORATION v. BRAGDON, 106 N. E. (MASS.) 633.—*Held,* fraudulent representations by a vendor's agent concerning land did not vitiate a contract for the sale thereof, when the contract expressly provided that no agent had authority to make any representation or agreement not contained in the contract.

The fraudulent representations of an agent made in the course of the business of his principal bind the principal. *Teters v. Hinders,* 19 Ind. 93. The vendor of land is responsible for material misrepresentations made by his agent, though unauthorized and the agent did not have actual knowledge whether the representations were true or false. *Bennett v. Judson,* 21 N. Y. 238. An innocent vendor is not liable in an action of deceit brought for the fraudulent representations of his agent. *Decker v. Fredericks,* 47 N. J. L. 469. Of course where an agent makes false representations with intent to defraud the purchaser, an action for deceit will lie against him by the vendee. *Hidden v. Griffin,* 136 Mass. 229. The representations of an agent are not binding upon his principal unless they were made at the time of the contract and constituted a part of the *res gestae. Cate v. Blodgett,* 70 N. H. 316. Where a seller's agent misrepresents to a purchaser the meaning of ambiguous words used in the contract of sale, the purchaser may rescind the contract though it contained a stipulation that no other representations than those therein printed would be binding on the principal. *Barrie v. Miller,* 104 Ga. 312. Where a contract of sale declared that only agreements contained in the contract were binding, representations of the agent of the seller not included in the contract were of no effect. *Bruner v. Kansas Moline Plow Co.,* 7 Ind. T. 506; *Cook v. Whitfield,* 41 Miss. 541. A provision in a contract procured by the agent of the seller, that the seller will not be held responsible for any agreement not expressed in the contract in writing, does not relieve him from liability for the fraudulent representations of his agent within the scope of his apparent authority. *Smith v. Hildenbrand,* 36 N. Y. Supp. 485. This last case cited must be deemed wrong on principle because the doctrine of ostensible authority can have no application where the authority of the agent is expressed in the instrument signed by the vendee. The principal case is in accord with the weight of authority.

PLEADING—SUIT TO RECOVER FOR WORK DONE.—HENNESSY v. PRESTON, 106 N. E. (MASS.) 570.—*Held,* where a contractor sues, in debt or its equivalent, for the contract price, alleging in general terms complete performance, he cannot recover on proof of substantial performance, which is less than complete performance. His remedy is in special assumpsit.

Before the common counts can be used, all conditions required by law must be fulfilled; i. e., all express and implied conditions must be fulfilled. *Carroll County v. Collins,* 63 Va. 302; *Independent Order of Mutual Aid v. Paine,* 17 Ill. App. 572; *Expanded Metal Co. v. Boyce,*

233 Ill. 284. But in bills and notes, under an allegation of performance, plaintiff may show anything that will excuse performance. *Spann v. Baltzell,* 1 Fla. 301; *Norton v. Lewis,* 2 Conn. 478; *Williams v. Cowen,* 3 Cowen, 252. And there is a tendency to apply the bills and notes rule to insurance cases. *German Ins. Co. v. Gumert,* 112 Ill. 68; *Levy v. Ins. Co.,* 10 W. Va. 560. When the express contract states no more than the law will imply, the common counts may be used. *Davis v. Smith,* 79 Me. 351; *Pitkin v. Frink,* 8 Met. 12; *Gibbs v. Bryant,* 1 Pick. 118. The majority of courts hold that substantial performance is sufficient, if it is done in good faith. *Nolan v. Whitney,* 88 N. Y. 648; *Jones v. Davenport,* 74 Conn. 418. The better rule seems to be that when the plaintiff has substantially performed, he can recover under the common counts. *Peltier v. Sewall,* 12 Wend. 386; *Nolan v. Whitney,* 88 N. Y. 648.